The Court of Justice as an Actor in the Migration Crisis

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A. Introduction

The number of persons displaced in 2015 globally was the highest since the aftermath of World War II.[1] The 2015 refugee crisis[2] saw several European Union (EU) Member States (MS) reinstating internal borders, while EU institutions were accused of opting for rules inadequate to attain declared objectives.[3] Faced with the crisis, the EU attempted to preserve as much of its asylum policy as possible.[4] Despite gestures of solidarity by some MS, the EU witnessed a solidarity crisis and fissures in the asylum system began to appear. Many authors accordingly declared that the EU institutions and its asylum policies have failed to step up to the humanitarian crisis at hand.[5] I will

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1 *Martin*, Georgetown Journal of International Affairs 2016/17(1), p. 5.

2 The term 'refugee crisis' has been referred to indicate EU and the MS' inability to handle effectively the increased arrival of asylum seekers who were fleeing from armed conflict in Syria in 2015-2016. See *Witte* & *Evangelia*, Common Market Law Review 2018/55(5), p. 1459.

3 *Park*, pp. 317-318; *Thym*, Common Market Law Review 2018/55(2), p. 549.

4 *Trauner*, Journal of European Integration 2016/38(3), p. 312.

5 *Scipioni*, Journal of European Public Policy 2018/25(9), p. 1357.

attempt to identify and ascertain the role of the Court of Justice of the European Union (CJEU) in this setting.

I. Perspectives to be balanced in the migration crisis

The EU asylum system is based on two significant principles: The first is that the EU offers to its citizens an area free from internal frontiers in accordance with Art. 3(2) TEU. The second is that the EU is a union founded on the values of respect for fundamental rights in accordance with Art. 2 TEU. Both of these factors are at play concerning any EU intervention in the migration crisis. Let's consider both these factors in turn.

Firstly, having eliminated internal borders within the EU, a need for protecting its external borders arises. The external EU border comprises a common external geographic border of the MS which lie on the periphery of the EU. Having absolved the MS from the responsibility to maintain borders vis-à-vis other MS does not mean that the need to protect the EU's external border has evaporated.[6] Accordingly, MS lying on the periphery are therefore charged with protecting the external EU border and also to ensure that only those individuals who are deserving of international protection are allowed to enter into the EU through the external borders.[7] As EU law envisages, if the MS let someone in, they are charged with examining their applications for asylum. This may be referred to as the *first state responsibility* rule.[8] Pursuant to this rule, an asylum seeker who has wandered elsewhere in the EU is, therefore, in principle, to be transferred back to the responsible state for examination of their application for asylum. In the crudest words possible, this responsibility is imposed as a sort of punishment for not protecting the EU border efficiently. This is the border protection and control element.

Coming to the second factor, in implementing the EU border protection policy, it cannot be forgotten that the EU is a *union of values* founded on respect for fundamental rights, dignity and the rule of law.[9] In its asylum policy, it must also ensure that it discharges its obligation towards respecting the standards set under international law. This includes specifically, the obligations under the 1951 United Nations Convention Relating to the Status of Refugees (Geneva Convention) as well as the

6 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (or Schengen Borders Code) is the instrument laying down common rules and requirements on the EU's external borders, OJ L 77 of 23/03/2016.

7 Article 14 (1) of Schengen Borders Code, provides that : 'A third-country national who does not fulfil all the entry conditions laid down in Article 6(1) and does not belong to the categories of persons referred to in Article 6(5) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas'.

8 *Hurwitz*, International Journal of Refugee Law 1999/11(4), p. 648. See also *Witte* & *Evangelia*, Common Market Law Review 2018/55(5), p. 1460.

9 Article 2 TEU; CJEU, case C-294/83*, Les Verts*, ECLI:EU:C:1986:166, para. 23.

1967 Protocol Relating to the Status of Refugees.[10] Simply put, international law requires that states must grant effective protection to those qualifying to receive it. This fundamental rights dimension to asylum policy is also recognized by EU asylum law, in particular, Article 18 of the Charter of Fundamental Rights of the European Union (Charter).[11]

These two elements are crucial to bear in mind as we examine the EU asylum laws and the CJEU decisions pertaining to it in the following sections.

II. Introduction to Dublin regime

In its asylum legislation infrastructure, the first relevant piece was the Dublin Convention[12] which was adopted alongside the Schengen Implementing Convention in 1990.[13] The 1990 Dublin Convention was replaced by the Dublin II Regulation[14] ('II' because it was the second piece of legislation after the Dublin Convention) and in turn by the Dublin III Regulation[15] which has been the law in force since 2013.[16]

The Dublin instruments have primarily focused on the efficient border control element. The view is to ensure that responsibility for individuals entering the EU should be immediately attributed and allocated upon the MS which will assign responsibility for examining asylum applications and organizing conditions for their reception. The Dublin instruments (including the Dublin II Regulation) were crafted with a view to regulating relations between MS, and it did not set out to involve asylum seekers.[17] In particular, the *first state responsibility* rule in the Dublin II Regulation was carried forward into the Dublin III Regulation as well.[18] Even if the individual travels on to

10 See generally *Batjes*.

11 Article 18 of the Charter provides that: 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as "the Treaties")'.

12 Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention, OJ C 254 of 19/08/1997.

13 *Guild*, International Journal of Refugee Law 2006/18(3-4), p. 636.

14 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50 of 25/02/2003, p. 1.

15 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180 of 29/06/2013, p. 1.

16 In May 2016, the Commission tabled a proposal for the reform of the Dublin III Regulation which currently remains pending.

17 *Guild*, International Journal of Refugee Law 2006/18(3-4), p. 636.

18 To reiterate, the first state responsibility rule means that the first MS which has let an individual into the EU is also responsible for examining their asylum application and organizing conditions for their reception.

a state different from the MS responsible within the EU, in principle they are to be transferred back to the MS responsible which is then to examine their application for asylum.

Clearly, the Dublin system (as it stands) doesn't aim at allocating the numbers of asylum seekers to all MS of the EU fairly or proportionately but is designed to attribute responsibility upon a MS as quickly as possible.[19] In hindsight, keeping the 2015 influx of refugees in mind, we now know that this principle aim doesn't work very well for large numbers of asylum seekers.[20]

III. Expected role of the CJEU

It thus became clear very quickly that the Dublin regime was falling apart in practice keeping the numbers it was facing in mind. MS were not following relocation decisions as envisaged in the law. Hungary and Slovakia rejected it more or less in principle, while no more than ten percent of transfers to responsible states were carried out from Germany.[21] The Commission itself admitted that the refugee crisis had exposed inherent weaknesses of the Common European Asylum System (CEAS).[22] The CJEU was presumably aware of the reality as it took jurisdiction of the matters relating to the refugee crisis.[23] What could the Court have done in this crisis?

Article 19 TEU tasks the CJEU with ensuring that 'in the interpretation and application of Treaties the law is observed.' The CJEU decides actions for annulment of acts of EU institutions, reviews instances of failure to act, infringement actions, appeals from the General Court and answers questions from national courts in response to their references for preliminary rulings.[24]

The role of the CJEU has also been widely discussed in the process of integration and the (so-called) expansion of EU competences.[25] Critics even allege that the CJEU sometimes achieves ends through its judgments which are better left for the MS to decide as legislators.[26] Regardless, the unique nature of the EU notwithstanding, the CJEU exercises powers usually wielded by constitutional courts.[27] And, therefore, it would not be incorrect to state that the CJEU has acquired the function of a 'constitutional court' over time.[28] The question then arises, whether the CJEU could and

19 *Garcés-Mascareñas*.
20 *Scipioni*, Journal of European Public Policy 2018/25(9), p. 1357.
21 *Thym*, Common Market Law Review 2018/55(2), pp. 549-550.
22 *European Commission*, Communication from the Commission to the European Parliament and the Council, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM(2016)197 final, pp. 3-4.
23 *Thym*, Common Market Law Review 2018/55(2), p. 556.
24 *Arnull*, Maastricht Working Papers 2012/13, p. 20.
25 *Weiler*, Comparative Political Studies 1994/26(4), pp. 510-513; *Weiler*, The Yale Law Journal 2008/100(8), pp. 2403-2408.
26 See for instance, *Herzog* and *Gerken*; Also see *Mattli,* & *Slaughter*, International organization 1998/52(1), pp.177-209.
27 *Vesterdorf*, International Journal of Constitutional Law 2006/4(4), p. 609.
28 *Rosenfeld*, International Journal of Constitutional Law 2006/4(4), pp. 622-623.

should redress the inadequacies of the Dublin system in the time of this crisis in exercising its constitutionality check. This is a tricky question.

The CJEU has itself ruled that the EU is a 'Community based on the rule of law.'[29] The separation of powers doctrine demands that courts toe the line separating the judiciary from that of the legislature or the executive.[30] This means that the CJEU may say what the law is, but it cannot change it.

What it can do in undertaking its tasks, is to ensure that the laws do not encroach upon the competences that have been retained by the Member States.[31] Moreover, it also ought to ensure that such laws do not encroach upon the exercise of rights that are recognized by the Charter.[32]

If the above criteria are fulfilled, and the laws are found valid under both of these criteria, the CJEU must then interpret the law, and be careful not to expand or change it. In other words, as a judicial actor, it is not the CJEU's job to fix legislative acts or redress the balance (if found wanting) between the two competing policy interests.[33] This applies even more so in constraining circumstances such as the refugee crisis.[34]

In the following sections of this paper I will attempt to see how the CJEU interprets and applies measures pertaining to the Dublin Regulations. Next, the evolution of the case law of the CJEU is examined keeping in mind the changes brought in when the Dublin II Regulation was recast into the Dublin III Regulation, particularly those relating to judicial review of transfer decisions and time limits under the Dublin III Regulation. After that, the principle of solidarity and fair sharing between MS, as is crucial for asylum cases, is briefly explained based on certain CJEU cases.

B. Analyzing the CJEU Jurisprudence

I. In interpreting measures in the context of CEAS: Sticking to Dublin?

As stated previously, once an individual enters the EU, they may travel around and apply for asylum in the MS of their choice because there are no internal borders. However, the mere presence of an individual does not give rise to the responsibility to examine their application for international protection and to organize the conditions for reception. In accordance with the Dublin III Regulation, if the MS in which

29 CJEU, case C-294/83, *Les Verts*, ECLI:EU:C:1986:166, para. 23.

30 *Lenaerts*, Common Market Law Review 1991/28, p. 11; *Arnull*, Maastricht Working Papers 2012/13, p. 20.

31 Article 5 (2) of the TEU states that: 'Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States'.

32 Article 6 (1) TEU provides as follows: 'The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties'.

33 *Witte* & *Evangelia*, Common Market Law Review 2018/55(5), p. 1458.

34 *Thym*, Common Market Law Review 2018/55(2), pp. 556-558.

the applicant is present is not the MS responsible, the applicant is in principle to be transferred to the MS responsible.[35]

Chapter 3 of the Dublin III Regulation contains a list of hierarchical criteria to help determine the MS responsible for examining the application for international protection and organizing the conditions for their reception.[36] These include cases of unaccompanied minors and safeguarding families, but the most important criterion is to determine the state responsible for the individual's presence in the EU. [37]

In the context of the refugee crisis, and influx in large numbers, the criterion most often applicable is that of 'irregular crossing'.[38] As previously stated this was the rationale behind the Dublin II Regulation and has been carried forward into the Dublin III Regulation. The MS which has let in someone *irregularly* is responsible to examine their application for international protection as well because they have 'failed to protect the EU external border'.

This *first state responsibility* rule might surely work well when a minuscule number of persons are seeping into the EU borders from time to time. This understanding has however surely evolved in the wake of the migration crisis. It is now understood that large numbers would exert an unimaginable pressure over the MS facing the bulk of individuals through the entry points; these are the MS bordering the EU.[39]

There has been evidence of additional pressure on the bordering states, for instance, when in 2008 the United Nations High Commissioner for Refugees (UNHCR), due to the challenges faced in respect to the quality of Greek asylum procedure and reception conditions, advised MS' governments to refrain from returning asylum seekers to Greece when the Dublin II Regulation was in force.[40]

Several commentators concluded that in view of this overburdening of certain MS, the Dublin Regulation is as good as suspended. As we will see however, from the decisions of the CJEU, it was very much not the case. The CJEU, however, has taken cognizance of the evidence of overburdening and ruled upon whether transfers may still carry to these MS on when such overburdening occurs.

In the *N.S.* case two references for preliminary ruling were made by the Irish and United Kingdom courts.[41] The referring court asked for an interpretation of Article 3(2) of the Dublin II Regulation when evidence of a burdened asylum system in Greece (MS responsible) was present. The case concerned asylum seekers who were to be

35 Article 18, Dublin III Regulation.

36 Dublin III Regulation employs the term 'Applicants for international protection' which has been used interchangeably with 'asylum seekers' in this paper.

37 E.g. See Article 12, Dublin III Regulation which deals with which MS provided a visa to the individual.

38 Article 13, Dublin III Regulation.

39 *Garcés-Mascareñas*.

40 *United Nations High Commissioner for Refugees (UNHCR)*, UNHCR Position on the Return of Asylum-Seekers to Greece under the "Dublin Regulation", 15 April 2008.

41 CJEU, Joined cases C-411/10 and C-493/10, *N.S. v. Secretary for the Home Department and M.E. et al v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, ECLI:EU:C:2011:865, para. 87 (*N.S.*).

returned to Greece as the MS responsible pursuant to the Dublin II Regulation. All of these individuals in this case resisted a transfer to Greece.

The referring courts presented evidence in the case showing that being the point of entry in the EU of almost 90% of illegal immigrants, Greece was facing significant pressures.[42] The question posed to the CJEU was whether a MS whose asylum system is suffering from such systematic flaws, which risks inhuman or degrading treatment within the meaning of Article 4 of the Charter, still remains the MS responsible within the meaning of Dublin II Regulation?

The CJEU answered in the negative. The Court decided that '[…] Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' […] where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.'[43]

In these cases, therefore, the MS where the asylum seeker is present are prohibited from transferring asylum seekers to a MS where such systematic flaws exist and must resort to the so-called sovereignty clause and start processing the asylum applications on their own.[44] The *N.S.* case can be hailed as a significant step wherein the CJEU effectively created an exception to the asylum regime when evidence of systematic deficiencies endangering human rights protection was present.[45]

The *N.S.* judgment, however, has been criticized for laying down a lower standard of protection compared to that of the *Tarakhel* case by the European Court of Human Rights in Strasbourg (ECtHR).[46]

The *Tarakhel* case concerned a family of eight Afghans who had entered the EU by crossing the Italian border first. Considering the asylum reception facilities in Italy inadequate, the family left and applied for asylum in Austria which was rejected.[47] Austria, in turn, asked Italy to take charge and Italy agreed. The family then traveled to Switzerland. Meanwhile, Austria informed Italy that the transfer had been cancelled because the family had gone missing.

The family subsequently applied for asylum in Switzerland. Switzerland rejected their application for asylum and made an order for their transfer to Italy. The family challenged this transfer decision before the ECtHR arguing that it would stand to violate, *inter alia*, Article 3 of the ECHR. The Court found that indeed it would amount to be a breach of Article 3 ECHR. The ECtHR noted that 'a thorough and

42 Ibid., para. 87.
43 Ibid., para. 94.
44 Ibid., para. 95. The sovereignty clause allows the MS in which the applicant for international protection is present to examine the application for asylum itself even if it is not the Member State responsible.
45 As we will discuss in the coming sections, the Court had developed an exception to the presumption of mutual trust in the field of asylum law. See *Xanthopolou*, Common Market Law Review 2018/55(2), pp. 494-495.
46 ECtHR, No. 29217/12, *Tarakhel v. Switzerland* (*Tarakhel*).
47 Ibid.

individualised examination of the situation of the person concerned' had to be conducted.[48]

A dichotomy appears to have emerged between the CJEU's 'systemic deficiencies' standard and the ECtHR's 'thorough and individualised examination' standard. Much ink has been spilled over which court of the two is better committed to protecting human rights.

On scratching the surface, however, it might become clear why the two courts would lay down differing standards. The EU MS are committed to upholding a set of common values giving rise to the principle of mutual trust.[49] This mutual trust entails that the MS recognize each other's rules and may cooperate without constant checks *i.e.* 'while another Member State may not deal with a certain matter in the same or even a similar way as one's own State, the results will be such that they are accepted as equivalent to decisions by one's own State.'[50] For the asylum law system, this would mean that a MS would presume without checking that other MS are effectively equally protecting fundamental rights. As such, the *N.S.* case drove away from the presumption of compliance with fundamental rights based on the principle of mutual trust in the face of evidence.[51] The *N.S.* case, however, formed a significant stepping stone in how the CJEU has developed the principle of mutual trust which we should examine a little further in detail.

The basis for this principle arises from Article 4(2) TEU which states that '[t]he EU shall respect the equality of Member States before the Treaties.' This principle thus precludes the EU from considering that certain MS are more committed to upholding the rule of law or fundamental rights than others.[52] The basis of this is that the MS are somewhat closer to each other than to third countries since they are all committed to upholding the values under Article 2 TEU which is not true for third countries. Such is the significance of the principle of mutual trust that the CJEU rejected the draft accession agreement to the ECHR on the basis that it endangered this principle.[53] Since then, the CJEU has chiseled the principle down from that of 'blind trust' to that one which relatively favors a rights-based narrative.[54]

Given that asylum law applies in the 'Area of Freedom, Security and Justice' (AFSJ), it concerns the principle of mutual trust. Accordingly, it forms the basis for several instruments which apply in the 'Area of Freedom, Security and Justice'. Akin to the Dublin III Regulation, this principle of mutual trust also underlies the European Arrest Warrant (EAW) framework which has to do with recognition of judicial decisions

48 Ibid., para. 104.
49 *Lenaerts*, Common Market Law Review 2017/54(3), pp. 808-809.
50 *European Commission*, Communication from the Commission to the Council and the European Parliament, Mutual recognition of Final Decisions in Criminal Matters, COM(2000)495 final.
51 *Xanthopolou*, Common Market Law Review 2018/55(2), p. 494.
52 *Lenaerts*, Common Market Law Review 2017/54(3), p. 808.
53 CJEU, *Opinion 2/13*, ECLI:EU:C:2014:2454, paras. 194-195.
54 *Xanthopolou*, Common Market Law Review 2018/55(2), p. 499.

across the AFSJ.[55] In the EAW framework, the principle of mutual trust guarantees that the exercise of free movement does not impair the effectiveness of judicial decisions adopted by the MS courts whose jurisdiction extends territorially.[56] The EAW framework thus allows that judicial decisions rendered by a competent court in one MS within the scope of EU law be automatically recognized and enforced across the EU.[57]

If a court were to automatically enforce a decision issued by another MS, it should have the trust that the court that rendered the decision at hand provided effective judicial protection to the persons affected by that decision, including protection of their fundamental rights.[58] Hence, based on this principle, the EU MS are able to trust that each of them is protecting fundamental rights adequately which is also the premise of the asylum system.[59]

The crucial point is how the principle of mutual trust plays out when instances of fundamental rights violations are brought before courts which is relevant in cases of asylum law and the EAW. Should the principle of mutual trust prevent the court from performing any kind of assessment regarding whether there is evidence of fundamental rights violations in other MS? The CJEU jurisprudence has now evolved from a rather strict insistence upon enforcing the principle of mutual trust in both areas.[60]

Mutual trust for the EAW framework meant that the MS could only derogate from executing an EAW based on the optional or mandatory grounds of refusal which are listed in the Framework Decision on the EAW. This strict adherence to mutual trust was preserved in the case of Radu, where the Court held that 'the executing judicial authorities cannot refuse to execute an EAW for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard in the issuing Member State before the arrest warrant was issued.'[61] The Court herein preserved the

55 Other instruments based on the principle of mutual trust which are applicable in the Area of Freedom, Security and Justice include Council Framework Decision 2009/829/JHA of 23 Oct. 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294/20 of 11/11/2009; Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1 of 18/07/2002 (as amended by the Council Framework Decision 2009/299/JHA of 26 Feb. 2009, OJ L 81/24 of 27/03/2009); Directive 2011/99/EU of the European Parliament and of the Council of 13 Dec. 2011 on the European protection order, OJ L 338/2 of 21/12/2011.

56 *Lenaerts*, Common Market Law Review 2017/54(3), p. 808.

57 Ibid., p. 810.

58 Ibid., p. 810. See for instance CJEU, case C-452/16 PPU, *Poltorak*, ECLI:EU:C:2016:858, paras. 44-45.

59 *Lenaerts*, Common Market Law Review 2017/54(3), pp. 805, 812. For commonalities between the asylum system and the EAW framework, see *Xanthopolou*, Common Market Law Review 2018/55(2), p. 492.

60 Mutual trust principle is applicable in both the asylum law as well as EAW framework. See CJEU, case C-163/17, *Abubacarr Jawo v. Bundesrepublic Deutschland*, ECLI:EU:C:2019:218, para. 78, which deals with asylum law wherein the CJEU refers to *Aranyosi* and *Căldăraru* (dealing with EAW).

61 CJEU, case C-396/11, *Ciprian Vasile Radu*, ECLI:EU:C:2013:39, para. 43. See also *Xanthopolou*, Common Market Law Review 2018/55(2), p. 493.

efficacy of the EAW system over protection of fundamental rights given the principle of mutual trust.

The reverence for the principle of mutual trust in the EAW framework, however, ended with the case of *Aranyosi & Căldăraru*.

In the 2016 case of *Aranyosi & Căldăraru*, the Court ended its era of presumptive reliance on mutual trust and created fundamental rights-based exceptions to the principle of mutual trust.[62] The Court was faced with a situation that an execution of an EAW by the *Oberlandsgericht* Bremen would lead to a potential violation of the fundamental rights of Mr. Aranyosi, a Hungarian national, and Mr. Căldăraru a Romanian national (who had EAWs issued against them for respective offenses).

The CJEU noted that it had 'recognised that limitations of the principles of mutual recognition and mutual trust between Member States can be made "in exceptional circumstances"'.[63] It followed that the *Oberlandsgericht* Bremen could not surrender Mr. Aranyosi and Mr. Căldăraru to the Hungarian and Romanian authorities respectively unless sufficient individualized guarantees assured against a violation of Article 4 of the Charter, which protects from inhuman and degrading treatment.[64]

The Court held that, 'where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalized, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State.'[65]

Coming back to asylum law, the standard of 'systemic deficiencies' was further clarified by the CJEU in the 2017 case of *C.K.*[66] Ms. C. K., a Syrian national had entered the EU with her partner on a valid short-term visa issued by Croatia. After a short stay there, they crossed the Slovenian border into Greece. Ultimately, she was admitted to a reception center in Slovenia and submitted an asylum application there. The Slovenian authorities determined that Croatia was responsible for examining the asylum application. This request was accepted by Croatia too. However, given that Ms. C. K. was in the advanced stages of her pregnancy, the transfer was not carried out.

62 CJEU, Joined cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198, (*Aranyosi & Căldăraru*).
63 Ibid., para. 82; Also see *Anagnostaras*, Common Market Law Review 2016/53, p. 1683.
64 CJEU, Joined cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*, ECLI:EU:C:2016:198, para. 104.
65 Ibid., para. 104.
66 CJEU, case C-578/16 PPU, *C.K., H.F., A.S. v. Republika Slovenja*, ECLI:EU:C:2017:127 (*C.K.*); *Xanthopolou*, Common Market Law Review 2018/55(2), p. 497.

Further, Croatia gave assurances that the individuals would receive accommodation, adequate care and any necessary medical treatment in Croatia.[67]

Subsequently, Ms. C.K. was diagnosed with post-partum depression after the birth of her baby which meant that any change in her circumstance would prove to be a serious risk to herself and her baby. Asked to decide whether the transfer could be carried out regardless, the Court held that 'even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, the transfer of an asylum seeker within the framework of the Dublin III Regulation can take place only in conditions which exclude the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment, within the meaning of that article'.[68]

Having created this exception to the principle of mutual trust, the CJEU wishes to now rein it in slightly proving once again, that it has not relinquished the principle of mutual trust but only qualified it.[69] As recently as 2019, the CJEU further laid down guiding criteria to help national authorities assess as to the level of severity which would lead a violation of Article 4, Charter, the Court expounds as follows, '[t]he threshold cannot therefore cover situations characterized even by a high degree of insecurity or a significant degradation of the living conditions of the person concerned, where they do not entail extreme material poverty placing that person in a situation of such gravity that it may be equated with inhuman or degrading treatment.'[70] The Court therefore wishes to clarify that the threshold is a high one. This averment notwithstanding, the applicant may still raise 'particular vulnerability' which is irrespective of wishes and personal choices to meet the criteria of extreme material poverty.[71] In this context an asylum seeker would have to show circumstances peculiar to them to justify why the transfer should not take place. The crux of these 2019 cases is that the Court wishes to highlight that merely because some MS have more favorable social and living circumstances than others, a transfer from a more favorable to a less favorable MS cannot be equated with a real risk of violation of Article 4 of the Charter.[72]

Having qualified the principle of mutual trust in favor of fundamental rights protection in AFSJ, the CJEU has taken a big leap, but nonetheless maintains a high

67 CJEU, case C-578/16 PPU, *C.K., H.F., A.S. v. Republika Slovenja*, ECLI:EU:C:2017:127, para. 34.
68 Ibid., para. 96.
69 On this point also see *Xanthopolou*, Common Market Law Review 2018/55(2), p. 494.
70 CJEU, case C-163/17, *Abubacarr Jawo v. Bundesrepublic Deutschland*, ECLI:EU:C:2019:218, para. 93. Also see CJEU, Joined cases C-297/17, C-318/17 *Ibrahim*, C-319/17 *Sharqawi and others* & C-438/17 *Magmadov*, ECLI:EU:C:2019:219, paras. 90-93.
71 CJEU, case C-163/17, *Abubacarr Jawo v. Bundesrepublic Deutschland*, ECLI:EU:C:2019:218, para. 94. Also see CJEU, Joined cases C-297/17, C-318/17 *Ibrahim*, C-319/17 *Sharqawi and others* & C-438/17 *Magmadov*, ECLI:EU:C:2019:219, paras. 90-93.
72 CJEU, case C-163/17, *Abubacarr Jawo v. Bundesrepublic Deutschland*, ECLI:EU:C:2019:218, para. 97. Also see CJEU, Joined cases C-297/17, C-318/17 *Ibrahim*, C-319/17 *Sharqawi and others* & C-438/17 *Magmadov*, ECLI:EU:C:2019:219, paras. 90-93.

threshold of evidence which needs to be adduced if a real risk of violation of Article 4 of the Charter to prevent transfer is to be successfully argued.

II. In ensuring effective judicial protection for asylum seekers

In this part, judgments of the CJEU with regards to assuring effective judicial protection in favor of applicants for international protection against transfer decisions under the Dublin system will be analyzed.

As we will recall from the foregoing, the Dublin instruments were primarily designed to regulate the allocation of responsibility between MS with little to no involvement of the asylum seekers themselves. However, during the transition from the Dublin II Regulation to the Dublin III Regulation, certain changes came into effect. While the Dublin II Regulation mainly provided a mechanism between MS to allocate responsibility for examining asylum application, the Dublin III Regulation provided for the greater participation of asylum seekers in the process. For instance, Article 4 of the Dublin III Regulation provides that an applicant for international protection has a right to be informed about the status of their application. This grant of right to information is crucial because under Dublin III applicants were granted a right to appeal/ review of their transfer decisions.[73]

This change was picked up by the CJEU and interpreted as a specific choice of the legislator, which allowed avenues for challenges to transfer decisions by asylum seekers on the grounds that criteria under the Dublin III Regulation had been misapplied. This was possible under very limited circumstances under the Dublin II Regulation.

To get some perspective, in the 2013 *Abdullahi* judgment which was decided in the context of the Dublin II Regulation, the grounds for challenging a transfer decision were limited. The CJEU in *Abdullahi*,[74] held that '[…]the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure [..]'.[75] This means that the only way to challenge a transfer decision was by showing 'systemic deficiencies' which is a high threshold to attain.

Deciding a Dublin III Regulation case in this instance in *Ghezelbash*, the CJEU noted that the changes effected in Dublin III were not solely to improve the effectiveness of the Dublin system, but had also decided to enhance the role of asylum seekers in the process.[76]

Mr. Ghezelbash, an Iranian national, had applied for asylum in the Netherlands which was rejected as France accepted a take charge request from the Netherlands.

73 Article 27 of the Dublin III Regulation.

74 CJEU, case C-394/12, *Shamso Abdullahi v. Bundesasylamt*, ECLI:EU:C:2013:813 (*Abdullahi*). Also see *Xanthopolou*, Common Market Law Review 2018/55(2), pp. 496-497.

75 CJEU, case C-394/12, *Shamso Abdullahi v. Bundesasylamt*, ECLI:EU:C:2013:813, para. 60.

76 CJEU, case C-63/15, *Mehrdad Ghezelbash v. Staatssecretaris van Veiligheid en Justitie*, ECLI:EU:C:2016:409, para. 51 (*Ghezelbash*); *Xanthopolou*, Common Market Law Review 2018/55(2), pp. 496-497.

Mr. Ghezelbash submitted evidence that he had left France for over 3 months and that the Netherlands was responsible for examining his application for asylum. He, therefore, alleged that the Dutch authorities had denied his asylum application based on a misapplication of Article 12 of the Dublin III Regulation. The preliminary request referred to the CJEU raised the question as to whether this ground could be raised by him.

Replying in the affirmative, the Court held that '[…]an asylum seeker is entitled to plead, in an appeal against a decision to transfer him, the incorrect application of one of the criteria for determining responsibility laid down in Chapter III of the regulation[…]'.[77] The Court justified this broad interpretation of the right to remedy in the Dublin III Regulation by stating that that in order to have a real remedy, the asylum seeker should be able to raise more grounds such as misapplication of Chapter 3 criteria and not merely systemic deficiencies leading to a violation of Article 4 of the Charter.[78]

The next case deals with a wrongful application of not Chapter III of the Dublin Regulation, but that the responsibility of a MS had been determined by a disregard of Article 19(2) of the Regulation.[79]

Mr. Karim, a Syrian national, applied for asylum in Sweden. Upon a search of his records, he came up in the European Asylum Dactyloscopy Database (EURODAC) as already having had applied for protection in Slovenia previously. The Swedish authorities requested Slovenian authorities to take charge of examining his application to which they agreed.

Meanwhile, Mr. Karim presented additional evidence to the Swedish authorities to the effect that he had left Slovenia for over three months, which meant that Slovenia's responsibility had ceased within the meaning of Article 19(3) of the Dublin III Regulation. Pursuant to an exchange of letters, Slovenia repeated its willingness to accept Mr. Karim and Sweden rejected his request for asylum and closed the case. Mr. Karim then challenged this rejection.

Applying its previous ruling from *Ghezelbash* in this case, CJEU replied that 'an asylum applicant may, in an action challenging a transfer decision made in respect of him, invoke an infringement of the rule set out in the second subparagraph of Article 19(2) of that regulation.'[80] The CJEU had thus further broadened the grounds for challenging decisions taken under the Dublin III Regulation.

Next, the CJEU was faced with the question, whether asylum seekers could bring up Article 13(1) of the Dublin III Regulation (which is also referred to as the criterion of irregular crossing) in their challenges in the 2017 decision of *A.S.* which is discussed below.[81]

77 CJEU, case C-63/15, *Mehrdad Ghezelbash v. Staatssecretaris van Veiligheid en Justitie*, ECLI:EU:C:2016:409, para. 61.
78 Ibid., para. 53.
79 CJEU, case C-155/15, *George Karim v. Migrationsverket*, ECLI:EU:C:2016:410.
80 Ibid., para. 27.
81 CJEU, case C-490/16, *A.S. v. Republika Slovenija*, ECLI:EU:C:2017:585(*A.S.*).

A.S. left Syria and traveling through a host of countries entered Croatia from Serbia in 2016. Croatian authorities arranged for him to travel to Slovenia. The Slovenian authorities attempted to hand him over to Austria unsuccessfully. He applied for international protection in Slovenia. The Slovenian authorities asked Croatia to take charge on the basis of Article 21 of the Dublin III Regulation. This request was agreed. Slovenia, therefore, decided not to examine A.S.'s application for international protection.

The referring court asked the CJEU whether an applicant could challenge a transfer decision on the basis of the misapplication of Article 13.[82]

Reiterating its ruling in *Ghezelbash*, the Court replied, 'an applicant for international protection is entitled, in an appeal against a decision to transfer him, to plead incorrect application of the criterion for determining responsibility relating to the irregular crossing of the border of a Member State, laid down in Article 13(1) of that regulation.'[83]

The CJEU hence applied the reasoning of *Gezhelbash* & *Karim mutatis mutandis* to this case and held that the applicants for international protection may also challenge the misapplication of the irregular crossing criterion under the Dublin III Regulation.

The crux of the above cases may be boiled down to a couple of very simple statements- the Dublin system is designed to allow MS to cooperate. The Court took note that it also accords certain rights to asylum seekers who have a legal interest in the outcome of their decisions. The above cases exhibit liberal consideration of the grounds which may be raised by asylum seekers when they are challenging transfer decisions by way of judicial review.

III. In determining time limits strictly

As discussed above, the Dublin process is designed to allocate responsibilities as to which MS is responsible for determining whose asylum application. This must be done quickly because this allocation of responsibility is only the first step to deduce which forum will examine the particular asylum application. It is for this reason the Dublin III Regulation provides for time limits within which MS must make assessments and carry out transfers. If they do not abide by these time limits, the delayed decisions become open to challenge by applicants for international protection.

In order to understand this situation, let's consider a hypothetical example. If an application for asylum is made in Croatia, but the Croatian authorities consider that Germany is the MS responsible to examine that application because Germany once granted them a short-term visa which expired but the applicant never left the EU. In this case the Croatian authorities have to request Germany to take over the applicant for international protection. However, Croatia must do this in a specified time-limit otherwise the responsibility to examine the asylum application will shift from Germany to Croatia.

82 Ibid., para. 24.
83 Ibid., para. 35.

In another version of this hypothetical scenario, Croatia has asked Germany to take this asylum seeker, and Germany has agreed. But if Croatia does not transfer this person within the set time limit, the responsibility may also shift to Croatia.

Can non-compliance with these time limits be raised by asylum seekers in their appeals and applications for review? This will become clear by examining a few CJEU decisions in this regard discussed below:

First is the case of *Mengesteab* wherein the CJEU was asked whether an applicant for asylum may rely on the expiry of time limit laid down in Article 21(1) of the Dublin III Regulation, even though the MS responsible is still willing to take the person.[84]

Mr. Mengesteab, an Eritrean national, requested asylum in Germany on 14 February 2015. He came up as a 'EURODAC hit' indicating that he had entered the EU irregularly through Italy. Therefore, Italy was requested to take charge on 19 August 2016. In a decision dated 10 November 2016, the German authorities rejected his application for asylum. Mr. Mengesteab challenged this decision before the administrative court. He argued that the take charge request had been made only after the expiry of the three-month period provided for in the first subparagraph of Article 21(1) of the Dublin III Regulation.[85]

The referring court asked the CJEU whether the expiry of the period laid down under Article 21(1) of the Dublin III Regulation could be raised as a ground even if the requested MS is still willing to take charge of the applicant?[86]

Interpreting Article 21 of the Dublin III Regulation strictly, the CJEU ruled that 'a take charge request cannot validly be made more than three months after the application for international protection has been lodged, even if that request is made within two months of receipt of a EURODAC hit within the meaning of that article.'[87]

Further, the Court affirmed that 'an applicant for international protection may rely, in the context of an action brought against a decision to transfer him, on the expiry of a period laid down in Article 21(1) of that regulation, even if the requested Member State is willing to take charge of that applicant.'[88]

It is to be noted that this decision was made in the immediate aftermath of the large wave of refugees in Germany at the time, because of which the authorities were under immense constraints to process asylum applications. This strict interpretation of time limits was much to the dislike of MS struggling to process asylum claims in time.[89]

This ruling was followed in *Shiri* shortly after, wherein the CJEU determined what was to happen if the requesting state failed to transfer an applicant within the prescribed time limit of 6 months.[90]

84 CJEU, case C-670/16, *Tsegezab Mengesteab v Bundesrepublik Deutschland*, ECLI:EU:C:2017:587 (*Mengesteab*).
85 Ibid., para. 36.
86 Ibid., para. 41.
87 Ibid., para. 74.
88 Ibid., para. 62.
89 *Thym*, Common Market Law Review 2018/55(2), p. 555.
90 CJEU, case C-201/16, *Majid Shiri v. Bundesamt für Fremdenwesen und Asyl*, ECLI:EU:C:2017:805 (*Shiri*).

Let's go back to the hypothetical example of Croatia and Germany. Croatia asks Germany to take over an asylum seeker while complying with the three-month or two-month time limit provided in Article 21 of the Dublin III Regulation. Germany accepts this request. However, Croatia doesn't do anything for six months. According to the Dublin III Regulation, has the responsibility now shifted to Croatia? Further, is the asylum seeker able to challenge a transfer order on this basis?

Similar to its ruling in *Mengesteab*, the CJEU ruled that, 'where the transfer does not take place within the six-month time limit as defined in Article 29(1) and (2) of that regulation, responsibility is transferred automatically to the requesting Member State, without it being necessary for the Member State responsible to refuse to take charge of or take back the person concerned.'[91]

The expansive reading of individual rights in *Mengesteab* and *Shiri* has developed the jurisprudence of *Ghezelbash* and *Karim* further. This also means that the bordering states know that it is the onus of the MS where the asylum seeker is present to carry out transfers swiftly; otherwise, it will shift the onus on to them. While technical in nature, in practice, this interpretation will go a long way in curtailing the *first state responsibility* rule.[92]

IV. Solidarity and fair sharing principle

The principle of solidarity enshrined in Article 80 of the TFEU governs all laws adopted in the context of the CEAS. This applies as an umbrella principle over all legislation including the Dublin III Regulation as well as the Council Decision 2015/1601 which was designed to help Italy and Greece deal with a sudden influx of migrants in the summer of 2015.

This principle presented itself at issue in *Jafari*.[93] In this case, the CJEU was asked to define the concept of 'irregular crossing' under the Dublin III Regulation. It was known that the EU faced a bulk wave of migrants from the Balkan route. The Jafari sisters entered the EU during one such influx. They left Afghanistan, both taking their children and traveled to Iran, then Turkey, Greece, the former Yugoslavia Republic of Macedonia and Serbia, into Croatia and external border to the EU. The Croatian authorities organized their transport to the Slovenian border, where they were given documents stating that one of them was destined to Germany and the other one to Austria. In other words, they were 'waved through' into the EU.[94]

Once they arrived in Austria, they filed applications for asylum for themselves and their children. The Austrian authorities deemed that Croatia was responsible because the Jafari sisters had crossed the border irregularly. The Austrian authorities noted that Greece could not be the MS responsible since they were suffering systematic

91 Ibid., para. 34.
92 *Thym*, Common Market Law Review 2018/55(2), p. 564.
93 CJEU, case C-646/16, *Khadija Jafari, Zainab Jafari and Bundesamt für Fremdenwesen und Asyl*, ECLI:EU:C:2017:586 (*Jafari*).
94 The 'wave through' approach is aptly translated to German as 'durchwinken'.

deficiencies. The Croatian authorities were ready to accept them. Hence an agreement had been reached.

The sisters challenged the decision to transfer them to Croatia on the ground that their entry into the territory had been 'tolerated' by the Croatian authorities. In reality, there were tens of thousands of migrants crossing through the Serbian and Croatian border every day. It was on humanitarian grounds that the border authorities had allowed them in. Some even got police protection to ensure that they do not lose their way ahead.

The Jafari sisters wanted either Austria or Germany to examine their asylum applications. Hence, they made their plea of 'tolerated' entry to challenge the transfer decision. Does that mean, if the border authorities, owing to humanitarian reasons as such, tolerate or allow entry, they are absolved of their responsibility to examine asylum applications under the Dublin III Regulation?

The CJEU noted that, 'the fact that the authorities of one Member State, faced with the arrival of an unusually large number of third-country nationals seeking transit through that Member State in order to lodge an application for international protection in another Member State, tolerate the entry into its territory of such nationals who do not fulfil the entry conditions generally imposed in the first Member State, is not tantamount to the issuing of a "visa" within the meaning of Article 12 of the Dublin III Regulation.'[95] Therefore, the Court noted that a tolerated entry would nonetheless amount to an irregular crossing.

Refusing to consider the 'wave through' as absolving responsibility might seem harsh on the bordering EU states, but this should be seen in the context of the CJEU rulings in *Mengesteab*, *Shiri* and *A.S.*, etc. which established that time limits under the Dublin III Regulation are to be taken strictly. Moreover, transfers may definitely not continue if they lead to systematic deficiencies in the asylum system of the bordering states leaving them with no choice but resorting to the sovereignty clause. If one reads the Dublin III Regulation together with these decisions, it makes sense overall.[96]

The next case the CJEU faced was a challenge to the EU provisional measure to relocate asylum seekers from overburdened MS. The Council had adopted the 2015/1601 Decision based on Article 78(3) TFEU which specifically deals with emergency situations. The aim of this decision was to temporarily relieve the significant pressures on Italy and Greek asylum systems and provide compulsory relocation from Italy and Greece to other MS over the period of 2 years which has now expired.[97] So this was a legislative response in a crisis situation. Slovakia and Hungary were outvoted on this decision given that this was adopted by the qualified majority voting mecha-

95 CJEU, case C-646/16, *Khadija Jafari, Zainab Jafari and Bundesamt für Fremdenwesen und Asyl*, ECLI:EU:C:2017:586, para. 58.

96 This is discussed in further detail in the next section.

97 *European Commission*, Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary, COM(2015) 451 final.

nism. Poland had initially voted in favor but changed its stance once the government changed and joined Hungary and Slovakia in this challenge.[98]

In this challenge, the CJEU had to interpret the principle of solidarity and fair sharing of responsibility. Hungary had argued that the contested decision had brought about a disproportionate burden on its asylum system. It is interesting to note that Hungary was actually initially also supposed to benefit from the emergency relocation scheme, but resisted inclusion in the instrument stating it did not require assistance through the emergency relocation scheme because most of the asylum seekers had merely sieved through its borders with only a few hundred remaining.[99] When not benefitting from the scheme, Hungary was supposed to take in about 2000 people, a number determined in accordance with the objective criteria. Hungary argued however that this was a disproportionate burden on them and stated that Hungary was a 'virtually ethnically homogeneous, like Poland' and whose populations are different, from a cultural and linguistic point of view, from the migrants to be relocated on their territory.'[100]

This argument basically translated to asylum seekers are so different from who we are, this would mean a disproportionate burden for us to accommodate them. Answering this plea, the CJEU rightly held that: 'If relocation were to be strictly conditional upon the existence of cultural or linguistic ties between each applicant for international protection and the Member State of relocation, the distribution of those applicants between all the Member States in accordance with the principle of solidarity laid down by Article 80 TFEU and, consequently, the adoption of a binding relocation mechanism would be impossible.'[101]

In interpreting the criteria of 'irregular crossing' and by rejecting the challenge by Hungary, Poland, and Slovakia, the CJEU has reiterated the significance of the solidarity and fair sharing principle. The criterion of 'irregular crossing' interpretation seemingly unfair to bordering states, reinforces that the MS have eliminated borders based on the belief that the bordering MS are taking charge of protecting the external borders. Had the CJEU absolved the bordering MS of responsibility through a contravening interpretation, it would have been an unfair breach of that confidence. Secondly, the Council measure was the first legislative act which created mandatory obligations based on the solidarity and fair sharing principle under Article 80 TFEU. Through this measure, the legislature sought to relieve the pressure which was being solely shouldered by the bordering states. By validating this measure, the CJEU has signaled that legislative response brokering a political compromise is the right way to go in a crisis situation.

98 *Witte* & *Evangelia*, Common Market Law Review 2018/55(5), p. 1467.
99 Ibid., pp. 1463-1464.
100 CJEU, Joined cases C-643/15 and C-647/15, *Slovakia and Hungary v. Council*, ECLI:EU:C:2017:631, para. 302.
101 Ibid., para. 302.

C. Comments

The CJEU has tried to interpret the Dublin instruments rather *technically* in gleaning the objectives pursued by the legislator resulting in the provision of complete and effective judicial protection to the applicant for international protection. Given the scale of the crisis, arguments were made that the Dublin regulation was inadequate to work in exceptional circumstances.[102] Calls were made to declare an emergency and redress the skewed balance of the asylum system, or even pronounce it dead. The Court, however, interpreted and applied it as is. In this way, the Court avoided a 'judicial overstretch' or 'activism' and signaled that it is the legislature's responsibility to develop a sound asylum system.[103]

In identifying the scope of grounds which may be raised by asylum seekers in challenging transfer decision, the Court has ditched the distinction between substantive and procedural rules that govern the transfer of responsibility of applicants. In interpreting the rules on judicial review generously, the Court ensured that comparatively fewer asylum seekers will be sent back to the MS of first entry.[104] More grounds for challenge means fewer transfers. At the same time, by pinning this expansive interpretation as a choice of the legislator, the Court might also have set the course for a limited scope for judicial review in the future.[105]

Further, the Court has interpreted time limits strictly. This means that compliance with time limits prescribed under the Dublin III Regulation is tantamount to respecting procedural guarantees conferred upon the applicants for international protection. In consequence, if time limits are not adhered to, it will expose transfer decisions to challenge and that in practice means fewer asylum seekers would be sent back to MS of first entry.[106]

Lastly, to circle back to calls for redressing the broken Dublin system because of numbers, the Court did not conjure emergency interpretation to respond to these calls. This is even though presumably the CJEU was aware of the realities concerning the mass influx. Also, the way in which it interprets the Dublin regulation, as it has done strictly with a focus on fundamental rights protection, was set to have a huge impact on the governing systems of certain MS which were facing larger numbers of asylum seekers such as the Austrian and German governments. Despite these constraining

102 *Passauer neue Presse*, Seehofer unterstellt Merkel "Herrschaft des Unrechts", Passauer neue Presse of 10 Feb. 2016, available at: https://www.pnp.de/nachrichten/bayern/1958889_Seehofer-unterstellt-Merkel-Herrschaft-des-Unrechts.html (21/03/2019).
He declared the Western Balkan route to be "Herrschaft des Unrechts", Austrian Government authorized rejection of asylum seekers in future mass influx cases based on Article 72 of FEU Treaty. Also see *Hailbronner & Thym*, JZ 2016/71, pp. 753-763.

103 *Thym*, Common Market Law Review 2018/55(2), p. 556.

104 Ibid.

105 See Article 28(4), Commission Proposal, COM (2016) 270 final, 4 May 2016; *European Commission*, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the member State responsible for examining and application for international protection lodged in one of the Member States by a third-country or a stateless person (recast), COM(2016) 270 final.

106 *Thym*, Common Market Law Review 2018/55(2), p. 556.

circumstances, the CJEU did not show a tendency to bend these rules in order to ease the pressure on these governments. In consequence, despite being aware of the reality of the situation, the CJEU did not use it as a justification to lower the standards of protection or water down the Dublin Regulations.[107] The Court made clear that even in exceptional circumstances; it is not for the court to bend the law: There is no such thing as an emergency interpretation.[108]

As regards the annulment challenge from Hungary, Poland et al., the Court validated a measure which framed solidarity and fair sharing as an obligation rather than a discretionary act. [109] The Court has thus signaled that it would allow discretion to the EU legislator in making specific policy choices, but that would have to be done at the legislative level.

D. Conclusions

The CJEU has ignored repeated calls for correcting the broken balance of the Dublin regime or to declare it dead. As such it has attempted to salvage as much of it as possible by essentially conducting statutory interpretation. This is a sane approach as it appears to communicate that one must not panic and throw the baby out with the bathwater. In doing that, it has also left the much-criticized *first state responsibility* rule intact. Understandably, the Court recognizes it as the legislator's choice.

The Court thus has also chiseled down the mutual trust principle to accommodate fundamental rights protection for asylum seekers. The threshold for proving a real risk for violation of the Charter nonetheless remains a high standard. The Court will also not stand for forum shopping when it comes to processing of asylum applications. In deciding that the grounds for judicial review under the Dublin III Regulation be interpreted broadly, this indicates that asylum seekers are able to challenge transfer decisions on a larger number of grounds. This means fewer transfers to bordering states in practice. Moreover, by interpreting time limits strictly, the CJEU has given some respite to bordering states who will face fewer transfers if time limits for doing so are not complied with.

By interpreting that the 'waving through' approach does not relinquish the responsibility of bordering states under the Dublin III Regulation; the Court refused to relieve pressure off the bordering states. But keeping the decisions on grounds for judicial review and time limits in mind, this appears to make sense overall. An overall impact of its rulings on the working of the Dublin regime may be difficult to glean or as such even remain neutral. But then again, as we know, the Court never set out redress it. The CJEU rulings, however, seem to be a call to the legislator: Get your house in order!

Summing up, the refugee crisis is not an easy political scenario. It is lamentable as such that the EU rhetoric focuses so much on protecting borders and reducing num-

107 Ibid., pp. 556-558.
108 Ibid.
109 *Witte* & *Evangelia*, Common Market Law Review 2018/55(5), p. 1493.

bers rather than ensuring humanitarian protection.[110] The refugee crisis has exposed fault lines visible in the political discourse which have become marred in short-sightedness and too focused on the objective allocation of benefits and responsibility rather than what is normatively right.[111] In any event, the CJEU appears to be sending a signal: it is up to the EU legislature to manufacture the political will in order to broker difficult compromises between competing values.

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110 *Thym*, Common Market Law Review 2018/55(2), p. 560.
111 *Menéndez*, European Law Journal 2016/22.4, pp. 414-416.

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